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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 431

PARMELEE TRANSPORTATION COMPANY,
A DELAWARE CORPORATION,
Petitioner,

vs.

JOHN L. KEESHIN, RAILROAD TRANSFER SERVICE, INC., HUGH W. CROSS, THE NEW YORK CENTRAL RAILROAD COMPANY, HOWARD E. SIMPSON, PAUL E. FEUCHT, WAYNE A. JOHNSTON, FRED G. GURLEY, THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, THE BALTIMORE AND OHIO RAILROAD COMPANY, CHICAGO & NORTH WESTERN RAILWAY COMPANY, ILLINOIS CENTRAL RAILROAD COMPANY AND THE PENNSYLVANIA RAILROAD COMPANY,
Respondents.

REPLY BRIEF OF PETITIONER.

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Respondents.

REPLY BRIEF OF PETITIONER.

STATEMENT OF THE CASE.

(Reply to respondents' brief pages 3 to 6)

Respondents now concede that "the trial court erred in ordering a separate trial * * * of the issue of 'public injury'" (Resp. Br. 3) but assume that the commission of the error can be glossed over and ignored by the Court of

Appeals in determining whether petitioner's rights to a trial by jury have been destroyed.[1]

Moreover, respondents argue as though a full hearing was had and as though petitioner had the opportunity to present its case on the merits. The trial court expressly precluded such a trial. Respondents enumerate alleged facts seeking to justify the railroads' selection of Keeshin on the merits and contend "[t]he foregoing facts are not subject to dispute." (Resp. Br. 6.) But how could petitioner dispute those facts when trial of the conspiracy issue was prohibited. The only undisputed facts are those alleged in the complaint and those allegations emphatically reject respondents' implication that the costs of, and service offered by Keeshin were the reasons for his selection. Thus the complaint alleges that Keeshin was selected

> "regardless of whether the cost and terms proposed by Keeshin for such services were less favorable than could be obtained by them [the railroad defendants] as a result of free competition * * *." (R. 14.)

And further

> "The services performed by Transfer [Keeshin] pursuant to said contract have been and are more costly to said railroads and less extensive and valuable than

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1. Respondents note that the majority judges of the Court of Appeals agreed that the separate trial of the irrelevant public injury issue was error but only in its opinion in the related case of *United States* v. *McConnell* (unreported but before this Court on Petition for a Writ of Certiorari, Docket No. 498).

It should also be noted that while the majority opinion placed principal reliance upon petitioner's offers of proof on the irrelevant public injury issue to infer the existence of strenuous competition and the absence of an antitrust violation, the same majority in the *McConnell* contempt proceeding found that petitioner's rights to make offers of proof had been completely infringed by the trial court. (See R. 588, 590, 595-7, 603, 607, 626, 733-5, 935, 962-8, 1016.) (See Opinions attached as Appendix to McConnell Petition for Writ of Certiorari, Docket No. 498).

> the services previously performed by plaintiff [petitioner] and which plaintiff had offered to continue to perform." (R. 17.)

In dealing with the petitioner's offers of proof, the majority opinion of the Court of Appeals presumably recited the offers of proof as summarized in petitioner's brief in the Court of Appeals, but significantly omits the fact that Keeshin was selected despite higher proposed costs. The majority recites that:

> "The committee met on June 3 and unanimously voted for Keeshin."

But omits:

> "* * * despite the fact that: The Keeshin proposal provided for a higher transfer coupon rate of charge to the railroads (R. 605, 812-4, 818-9, 1220); the selection of Keeshin at a higher transfer coupon charge violated the sole objective of the negotiations to secure a cut in transfer costs, if possible; and several major issues of Keeshin's rates and services remained unresolved (R. 607-8, 815). The Keeshin contract was irrevocable for 5 years (Pl. Ex. 100, Ex. R. 361-80) despite the importance to the railroads of a clause permitting termination for cause. (R. 608)." (Pl. Br. in Ct. of App. p. 29.)

The material allegations of the complaint, which must be accepted as true, definitively alleges a conspiracy between six railroads, Keeshin and Cross to prevent competition for the transfer business. Parmelee and others were precluded from competing and the 21 Chicago terminal railroads constituting the entire market were caused to execute a joint exclusive, non-cancellable 5 year contract which monopolized that market.

It is in effect conceded by respondents that the complaint in substance and in fact charged that the instigator of the conspiracy was Cross, former chairman of the Interstate

Commerce Commission acting at the behest of defendant Keeshin; that Cross induced the defendant railroads to foreclose competition for the transfer business and do business exclusively with Keeshin; and that the defendant railroads joined the conspiracy in order to influence Cross to give favorable consideration to matters pending before the Commission. (Resp. Br. 6.)

Since the offers of proof admittedly sustain the above allegations the record conclusively shows a successful conspiracy to restrain competition in violation of the Sherman Act.

ARGUMENT.

I.

THE CONDUCT CHARGED IS A CLASSIC EXAMPLE OF ANTITRUST VIOLATION AND THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THIS COURT'S DECISION IN THE YELLOW CAB CASE.

A.

The Exclusive Contract Between the Railroads and the Transfer Agent is Unlawful Because it Created a Monopoly and Because it Came About Through a Conspiracy.

(Reply to Respondents' Brief pages 7 to 12)

Respondents interpret the opinion of the Court of Appeals as holding for their contention that it is "settled law" that the railroads have a right "as a group to enter into the transfer contract with an agent of their choice. * * *" (Resp. Br. 12.) They urge that *Yellow Cab* and other decisions hold "the Sherman Act inapplicable" to such an "exclusive contract". (Resp. Br. 7.)[2]

This position is taken in the face of admitted allegations of conspiracy by the defendants in the procurement of this joint exclusive transfer contract. Respondents' contentions completely corroborate the assertion made in our petition that the Court of Appeals granted the railroads immunity from the operation of the antitrust laws and therefore the decision should be reviewed by this Court by

2. In footnote 10, p. 8 of their brief, respondents say: "The right of the railroads to enter into a joint arrangement for railroad terminal facilities" is recognized in *U. S. v. St. Louis Terminal*, 224 U. S. 383, 402, 410. Actually this court held that the contract between fourteen railroads and a terminal company violated both Sections 1 and 2 of the Sherman Act.

certiorari in order to maintain effective enforcement of the antitrust laws for reasons of manifest public policy.

We urge that the joint exclusory five year contract is illegal standing alone, but irrespective of that position, it is elementary that if it came into existence by virtue of a conspiracy to preclude competition and is a means to effectuate that end, it is illegal under the express provisions of Section 1 of the Sherman Act.

Respondents and the Court of Appeals claim that the instant contract is not only legal standing alone, but in effect overrule the Sherman Act and applicable decisions of this Court by asserting that the fact that the contract was sired in conspiracy to foreclose a competitor is irrelevant.

Further, the opinion of the Court of Appeals and the argument of the respondents is a syllogism based upon a false premise. The premise is that the *Yellow Cab* case held that an exclusive contract such as is here presented is legal under the antitrust laws. That case held no such thing. There the Court found a number of exclusive contracts were illegal when acquired or maintained by conspiracy. There this Court expressly pointed out (332 U. S. at p. 229):

> "* * * a conspiracy to eliminate competition in obtaining those exclusive contracts is what is alleged in this case, and it is a conspiracy of that type that runs afoul of the Sherman Act."

In the instant case, there was one contract proffered, which was joined in by all railroads and provided that no railroad joining in the agreement could contract with any other transfer agent than Keeshin for a period of five years. Each of the railroads surrendered its rights to take independent action with respect to any matter covered by the contract. (R. 16.) It also contained price-fixing

provisions for services paid for by the public directly, which were illegal *per se*. (Ex. R. 370-1, Pl. Ex. 100, Para. 8; Ex. R. 371-3, Pl. Ex. 100, Para. 9; Ex. R. 389-90, Pl. Ex. 108; Ex. R. 392-3, Pl. Ex. 110.)

It is apparent that this Court has not passed on the legality of that contract. The contracts in the *Yellow Cab* case do not remotely resemble it. There Parmelee had oral at-will arrangements with individual railroads and no railroad surrendered its right of individual action or was precluded from dealing with any other transfer agent at any time while such contracts were in force. (R. 16.)

The Parmelee contracts were described by respondents' own witness, Padrick. He said (R. 1126):

> "There was no joint contract. There was no individual contract except, I believe, that there may have been two, and I think those were with the Grand Trunk or the Nickel Plate, I can't remember which, and the Erie. Now there may have been contracts with them, and I am not sure of that."

When asked whether Parmelee's arrangements were for a definite period, Padrick answered (R. 1221):

> "* * * we were working on a day-to-day basis."

Respondents are therefore in error when they assert that the Parmelee arrangements and the present single 5 year exclusory contract are "identical in all pertinent respects." (Resp. Br. 7, Note 7.)

Respondents assert:

> "The *Yellow Cab* case stands squarely for the principle that, as stated in the cited *Donovan* case, railroads have the absolute right and discretion to select an exclusive agent for performance of a railroad transportation service such as interstation transfer, and that consequently the antitrust laws are not violated when the right is exercised." (Resp. Br. 8.)

This contention completely ignores the provisions of the Sherman Act and the holding in the *Yellow Cab* case that there is no right to conspire to foreclose a competitor equipped to compete for a service to be rendered in interstate commerce.

The case of *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279 (1905), which this Court cited in *Yellow Cab*, involved only a single carrier and a single contract with a single transfer agent. It did not create a complete monopoly as does the instant contract, nor did it join together all railroads constituting the market for the petitioner's services.

The restraint charged in the *Yellow Cab* case was far less drastic than that presented here. There it was alleged that three affiliated companies refused to compete among themselves for the transfer business in Chicago.[3] In the instant case, as the result of an admittedly corrupt conspiracy between the six defendant railroads, Keeshin and Cross, all twenty-one competing railroads with terminals in Chicago agreed to deny anyone except Keeshin's company the right to compete for the transfer business in Chicago. Such a conspiracy is obviously illegal, not only because it excludes a competitor equipped to compete, but it also eliminates all possibility of competition and creates a total monopoly of the transfer business in Chicago for at least five years, thus representing as extreme a violation of the Sherman Act as can be imagined.

Respondents cite the case of *City of Chicago* v. *Atchison, T. & S. F. Ry. Co.*, 357 U. S. 77, 78-79 (1958), as authority for declaring the instant conspiracy and resulting contract legal under the antitrust laws. In that case, all that was involved was the validity of a City of Chicago ordinance.

3. At the trial, the court found that the government had failed to establish the existence of such an arrangement or of any restraint on competition. *United States* v. *Yellow Cab Co.*, 80 F. Supp. 936, 944 (D.C. Ill., 1948), aff'd 338 U. S. 338 (1949).

No antitrust issue was presented, urged or ruled upon by this Court. The case obviously is not in point, but its citation both by the Court of Appeals and by respondents discloses a complete lack of support in the precedents for respondents' position.

At pages 10 to 12, respondents argue to the effect that the contract is covered by the Interstate Commerce Act and is therefore immune from attack under the antitrust laws. This contention ignores the fact that the Interstate Commerce Commission had refused to exercise regulatory authority over the transfer operations and held that:

> "The baggage pick-up and delivery service performed by the respondent locally between points and places in the city of Chicago and suburbs is not subject to any provision of the act." (*Status of Parmelee*, 288 I. C. C. 95, 98 (1953).)

B.

The Railroads Had No Right to Conspire to Prevent Competitors Equipped to Compete from Competing for the Right to Perform the Transfer Service.

(Reply to Respondents' Brief pages 12 to 18.)

Respondents concede that the language in *Yellow Cab*, read literally, governs this case, but say the language is limited to the exact factual situation there presented (Resp. Br. 12). However, this Court did not so limit its opinion. It said:

> "Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation." (332 U. S. at 229.)

And further:

> "The statute is aimed at substance rather than form." (332 U. S. at 227.)

It thus appears that the *Yellow Cab* case establishes that any conspiracy, whether by buyers or sellers or third persons, to eliminate competition in obtaining transfer service contracts in this very market is prohibited by the antitrust laws.

Respondents now concede (Resp. Br. 18) that, as pointed out by Circuit Judge Duffy, there is no immunity under the antitrust laws for "a conspiracy of buyers, as opposed to sellers", and further concede that it cannot be contended "that a conspiracy between buyers and third parties has such immunity."

Now they say (Resp. Br. 13):

> "In the case at bar there is elimination of competition only in the sense that when one exclusive agent was selected, whatever the reason for the selection, the others were necessarily 'excluded.'"

Unfortunately for this contention, the Sherman Act says that if the reason for the selection is an illegal conspiracy, then that restraint falls afoul of the Sherman Act. The respondents' contention obviously ignores the fact that the complaint alleged, and the offers of proof showed, that the reason for the selection of Keeshin was the conspiracy that precluded any consideration being given to the offers of petitioner and others, even though admittedly better than Keeshin's.

Respondents next say (Resp. Br. 13) that the effect on the elimination of competition "was exactly the same whether the inducements and motives for entering into it with Keeshin instead of Parmelee were proper, or, as Parmelee charges and as we assume for present purposes, improper." Here, again, respondents deliberately ignore the effect of the illegal conspiracy in making acts, which standing alone might be legal, completely illegal when done pursuant to a conspiracy to restrain competition.

It is further argued that petitioner is contending that the Sherman Act requires the award of all contracts to the lowest responsible bidder. (Resp. Br. 14.) No such contention has ever been made by the petitioner. All that has been contended is that any competitor in an interstate commerce market is entitled to compete, free of the impediment of a conspiracy directed against such competitor and others having as its purpose to preclude them from any consideration whatever in their competition for the business.

The decisions of this Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U. S. 127 (1961) and *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469 (1940) are urged for the proposition that the respondents are given immunity from the effects of their illegal conduct because Cross, in his intervention into the situation and his inducement of the conspiracy, also violated certain common law rights of the petitioner. There is nothing in the *Noerr* or *Apex* cases which even remotely gives support to such a contention.

In *Noerr* while the Court was unwilling to find a Sherman Act violation based solely upon legislative lobbying no matter how unethical and economically impelled, the decision does stress that a violation of the Sherman Act exists in

> "combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements and other similar agreements." (365 U. S. at p. 136.)

The Court further stated:

> "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually

> nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." (365 U. S. at p. 144.)

We submit that this Court should lay at rest any such construction of its decisions in the *Noerr* and *Apex* cases as is asserted in the opinion of the Court of Appeals. Obviously, the argument here must mean that if a defendant in an antitrust case violates some other law or statute, by such violation he gains immunity under the antitrust laws. This petition affords this Court the opportunity of correcting any such flagrant misinterpretation of its decisions.

II.

THE DECISION BELOW VIOLATED EVERY PRINCIPLE OF PROPER JUDICIAL PROCEDURE AND DESTROYED PETITIONER'S RIGHT TO A JURY TRIAL.

(Reply to Respondents' Brief pages 19 to 22.)

The Pleadings.

It is conceded that:

> "Under the Federal Rules, a complaint which alleges, even in the form of conclusions, 'every element necessary to recovery' will not be dismissed as insufficient." (Resp. Br. 19.)

Respondents then proceed to argue that if the plaintiff elects to plead in detail the facts, then the court can determine their legal sufficiency. However both the majority and dissenting opinions in the court below concede that if the issue presented was whether or not the pleading was sufficient, the trial court's dismissal of the suit would have to be reversed. A reading of the complaint shows the statement of a classic antitrust violation case.

The Offers of Proof.

While the majority opinion below labors to utilize offers of proof to in some way destroy the allegations in the complaint, a fair reading of the offers of proof, as set forth in the majority opinion, shows that the six railroads who were dealing with the situation were brought together in a conspiracy to preclude any consideration being given petitioner's offer; that they were brought together in this conspiracy at the instigation of a Commissioner of the Interstate Commerce Commission at the behest of the respondent, Keeshin.

Respondents tacitly concede that this attempt by the court below cannot be sustained by the record. They now say (Resp. Br. 22):

> "The question was simply whether those ultimate facts, assuming they did occur, constituted a violation of the Sherman Act."

It is thus conceded that what is presented here is a clear question of law, raising for determination the proper construction of the antitrust laws and whether or not immunity can be gained from the application of those laws by the use of sophistry.

We agree with respondents that there is no conflict between the allegations of the complaint and the proffered proofs and we submit that under every decision rendered by this Court on the question of conspiracy, unity of action by competing railroads to exclude persons from a business in a segment of interstate commerce falls within the definition of a conspiracy and the ambit of the antitrust laws.

Respondents concede that the Court of Appeals could not properly raise inferences from the facts contained in the offers of proof. The court below, however, said:

> "* * * No interested bidder for the contract was pre-

> vented from competing for it. * * * The case made out by plaintiff's offers of proof and evidence reflects the unusual attention which high officials of the railroads bestowed upon the bidding. * * * Nor is this result precluded by the fact (which a court might well find on the case presented by way of offers of proof) that the victory of the successful bidder was made easier by the wrongful conduct of a public official. Assuming the record presented as to his involvement reflects the truth (which we are for this purpose required to do), any party damaged thereby has (and would have had, even before the enactment of the Sherman Act) a ground for relief in the courts of this country."

The majority opinion thus reached a conclusion which we submit is a complete *non sequitur*, i.e., that a conspiracy instigated in the course of contractual negotiations, which has the necessary effect of destroying any consideration of a competitor's bid to obtain the business in interstate commerce, is not actionable under the anti-trust laws merely because it did not have its inception until negotiations for a contract were under way. The mere statement of such an outrageous proposition should, we submit, be sufficient reason for the grant of the writ of certiorari in this case.

The facts alleged and contained in the offers of proof establish an actual restraint of competition. The majority opinion bears this out by reference to "the wrongful conduct of a public official" and "the unusual attention which high officials of the railroads bestowed." As the agreed facts explicitly demonstrate, the presidents of the railroads were brought into the matter by Cross who prevailed upon them to instruct their subordinates to accept Keeshin not on competitive considerations but to realize illicit advantages out of the regulatory processes through Cross. The attention of these high officials was "unusual", the intervention of Cross was "wrongful" and occurred solely for the purpose of preventing competition from working.

The Court of Appeals would deny relief to the victim of a conspiracy in restraint of trade merely because he was not prevented from submitting a bid to which the conspirators had agreed to give no consideration. If this decision is not reviewed, it will stand as a precedent for the denial of the right of a private plaintiff to maintain an antitrust suit for damages to his business and property whenever conspirators elect to go through the formality of receiving competitive offers to conceal their actual intentions. There would be no legal recourse even when negotiations were carried on as a mere pretense and as a planned element of the conspiracy.

Manifestly, this is a completely unjustifed interpretation of antitrust laws and this Court's decisions on the subject.

Conclusion.

The decision of the Court of Appeals in effect nullifies the antitrust laws in the Seventh Circuit, destroys petitioner's right to a jury trial and grants immunity to railroads conspiring among themselves and with outside third parties not subject to interstate commerce or other regulatory acts.

For the reasons stated here and in our original petition, we most respectfully submit that a writ of certiorari should issue.

Respectfully submitted,

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